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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PHA NHAT CHEA,

Defendant and Appellant.

B200454

(Los Angeles County  
Super. Ct. No. BA310216)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed with directions.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Pha Nhat Chea appeals the judgment entered following his conviction of two counts of attempted murder in which he personally discharged a firearm, two counts of assault with a firearm in which he personally used a firearm, one count of shooting at an occupied vehicle and one count of unlawful possession of a firearm. (Pen. Code, §§ 664/187, 12022.53, subd. (c), 245, subd. (a)(2), 12022.5, subd. (a), 246, 12022, subd. (a)(1).)<sup>1</sup> Chea admitted a prior conviction within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subs. (a)-(d)) and section 667, subdivision (a)(1). Chea also admitted two prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced Chea to a term of 47 years and 8 months in state prison.

Chea contends the trial court erroneously excluded evidence of a codefendant’s declarations against penal interest and the evidence did not demonstrate express malice, which is required for a conviction of attempted murder. We reject these contentions and affirm the judgment but order the abstract of judgment corrected to reflect imposition of the term imposed by the trial court.<sup>2</sup>

## **FACTS AND PROCEDURAL BACKGROUND**

### *1. Evidence adduced at jury trial.*

On October 1, 2006, at about 1:30 a.m., Juan Rodriguez was driving a white Mitsubishi Lancer on the Interstate 2 freeway (I-2) with Carlos Torres in the passenger seat. Rodriguez noticed a blue Dodge Caravan a few cars ahead of them swerving and driving erratically. Rodriguez put his high beams on the Dodge a “couple of times” to get the driver’s attention before Rodriguez passed. When the driver of the Dodge did not

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<sup>1</sup> Subsequent unspecified statutory references are to the Penal Code.

<sup>2</sup> The abstract of judgment fails to reflect imposition of a five-year enhancement under section 667, subdivision (a)(1), which the trial court imposed and thus incorrectly reflects a term of 42 years and 8 months in state prison. By letter dated November 25, 2008, we advised the parties of our intention to order the abstract of judgment corrected to reflect the sentence imposed and afforded the parties an opportunity to address this issue by supplemental letter brief. (Gov. Code, § 68081.)

react, Rodriguez again flashed his high beams. The Dodge stopped swerving and Rodriguez passed on the right while both vehicles were on the two-lane transition from the I-2 to the southbound Interstate 5 freeway (I-5).

On the I-5, Rodriguez moved to the number one lane and was six to eight car lengths ahead of the Dodge. However, the Dodge moved directly behind Rodriguez. Rodriguez tried to change lanes but the Dodge continued to tailgate. The Dodge then pulled next to the passenger side of the Mitsubishi and someone in the Dodge began to throw objects at the Mitsubishi.

When traffic stopped for freeway construction, Nelson Yuen, the driver of the Dodge, got out and began walking toward the Mitsubishi. However, traffic began to move and Yuen returned to the Dodge. When traffic stopped a second time, Yuen got out, approached the Mitsubishi, banged on the driver's door with his fist and angrily demanded that Rodriguez get out of the Mitsubishi.

While Yuen was pounding on the driver's door of the Mitsubishi, Torres, the passenger in the Mitsubishi, noticed Chea approach the passenger side of the Mitsubishi from the rear. Chea had a shiny object that looked like a gun. Rodriguez heard three or four loud bangs from the rear of the Mitsubishi. After the second loud bang, the rear window of the Mitsubishi shattered. Torres started honking the Mitsubishi's horn to attract the attention of a California Highway Patrol vehicle not too far from them. Torres saw Chea move away from the Mitsubishi and Yuen, who had remained on the driver's side of the Mitsubishi, returned to the Dodge.

Javier Banuelos and Heriberto Chaidez were stopped in the number three lane approximately 20 feet behind the Mitsubishi. Banuelos saw the driver of a van get out and approach the Mitsubishi. Chea got out of the passenger seat of a beige Honda Accord that was three cars behind the van and approached the passenger side of the Mitsubishi. Chea had a revolver in his hand. Chea banged with the gun and his hands on the passenger window of the Mitsubishi, then fired the revolver twice. Banuelos saw the revolver recoil after each shot. Chea was wearing a blue shirt when he fired the shots.

When Banuelos saw him later, he was wearing a white T-shirt. Banuelos identified Chea by a distinctive tattoo on his neck.

Chaidez saw two males run up to the Mitsubishi. One of the males shot at the Mitsubishi from a distance of about ten feet. The other male seemed to be struggling with the passenger. Chaidez testified both males were on the passenger side of the Mitsubishi.

Nelson Montano was stopped in traffic in a tractor trailer when he heard a loud boom and people shouting. Montano saw a male holding a shiny object that appeared to be a gun walk calmly to a Honda Accord and enter the front passenger seat.

California Highway Patrol Officer Cecil Holland and his partner were stopped in traffic in the number two southbound lane of the I-5. Holland heard two gunshots, then saw high beams flashing and heard a car horn honking. Holland exited the patrol vehicle and a white Mitsubishi approached in the number one lane, which was the only open lane. The occupants of the Mitsubishi were yelling, "He's trying to kill us." After speaking to the occupants, Holland stopped a blue Dodge Caravan driven by Yuen. Yuen appeared to be intoxicated and his blood alcohol content tested 0.09 in the field and 0.07 at the police station. Chea was the passenger in a beige Honda Accord.

Officers found a pair of brass knuckles under the driver's seat of the van and a box of ammunition in the van. An expended bullet was found on the right rear passenger floorboard of the Mitsubishi. The Mitsubishi's right side view mirror was damaged. A police dog alerted on the center console area of the beige Honda Accord. An officer removed a revolver from the area between the plastic housing of the gearshift and the carpet. The revolver contained two empty cartridges and four unspent bullets. The rounds of ammunition in the revolver exactly matched one of the two types of ammunition found in the van.

Chea tested positive for gunshot residue. A blue shirt was found in the backseat of the Honda.

*2. Jury convicts Chea of shooting at an occupied motor vehicle; deadlocks on attempted murder charges.*

The jury convicted Chea of shooting at an occupied motor vehicle (count 3) and unlawful possession of a firearm (count 4). The jury was unable to reach a verdict as to Chea or Yuen on the charge of attempted willful, deliberate and premeditated murder (counts 1 and 2). The trial court referred the matter to the master calendar court for retrial on these two counts.

*3. Retrial; submission on transcript.*

The People filed an amended information alleging two counts of assault with a firearm in which Chea personally used a firearm (counts 6 and 7) in addition to the two counts of attempted willful, deliberate and premeditated murder.

After a panel of prospective jurors had been called, Chea and Yuen waived jury trial and the parties agreed to submit the matter on the reporter's transcript of the jury trial. The matter was transferred to the trial court, which found Yuen not guilty of all charges and found Chea guilty of attempted murder in which he personally discharged a firearm but found the offenses were not willful, deliberate and premeditated. The trial court also convicted Chea of two counts of assault with a firearm in which he personally used a firearm.

## **CONTENTIONS**

Chea contends the trial court erroneously excluded declarations against penal interest made by Yuen and the evidence presented at trial was insufficient to demonstrate express malice.

## **DISCUSSION**

*1. Yuen's statements properly excluded.*

*a. Background.*

During the jury trial, defense counsel requested a side bar conference and indicated California Highway Patrol Officer Brian Muravez, who was then on the witness stand, would testify that on the night of the incident Yuen stated he was the one who fired the revolver and that he wanted to kill the guys in the Mitsubishi. Yuen then handed the

revolver to his friend and told him to get rid of it. Defense counsel indicated Chea wanted to elicit these statements in the presence of the jury to show that Chea was not the shooter.

The prosecutor sought to exclude the statements, arguing they were not trustworthy. The prosecutor noted Yuen made the statements to protect Chea who had a prior serious felony conviction and faced substantial prison time if convicted. Also, Yuen was intoxicated.

The trial court found the statements were declarations against penal interest. (Evid. Code, § 1230.) However, the trial court excluded the statements from evidence because they lacked trustworthiness.

b. *Chea's argument.*

Chea contends this ruling was error. Chea notes the factors to consider in determining whether a statement is trustworthy include whether the statement, though self-incriminating, also attempts to shift blame or curry favor. (*People v. Duarte* (2000) 24 Cal.4th 603, 611-612.) Chea argues Yuen's statements were not self-serving, did not seek to minimize his role in the crime and instead took full responsibility. Chea concludes the statements were admissible as declarations against penal interest. Chea asserts the excluded evidence was highly favorable to Chea and the jury was reluctant to convict. Thus, admission of the evidence might have altered the result.

c. *Legal principles.*

"We start with the proposition that the statements in question constituted hearsay and that, as a general rule, hearsay evidence is inadmissible. The chief reasons for this general rule of inadmissibility are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements. [Citations.]" (*People v. Fuentes* (1998) 61 Cal.App.4th 956, 960-961, fn. omitted.)

Evidence Code section 1230 codifies an exception to the hearsay rule for a declaration against interest. A hearsay statement qualifies as a declaration against penal interest if it could subject the declarant to the risk of criminal liability to such an extent that a reasonable person in the same position would not have made the statement unless he or she believed it to be true. (Evid. Code, § 1230; *People v. Brown* (2003) 31 Cal.4th 518, 536; *People v. Duarte* (2000) 24 Cal.4th 603, 610.)<sup>3</sup> The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made, and the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Duarte* at pp. 610-611; *People v. Cudjo* (1993) 6 Cal.4th 585, 607.)

Courts consider a variety of factors to determine whether a statement is trustworthy, including “ ‘the words [and] the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.’ ” (*People v. Cudjo, supra*, 6 Cal.4th at p. 607; see also *People v. Duarte, supra*, 24 Cal.4th at p. 614.) In this context, assessing trustworthiness “ ‘requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.’ ” (*People v. Frierson* (1991) 53 Cal.3d 730, 745.)

The trial court's exclusion of a declaration against penal interest is reviewed on appeal for abuse of discretion. (*People v. Brown, supra*, 31 Cal.4th at p. 536.)

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<sup>3</sup> Evidence Code section 1230 provides in full: “Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.”

d. *Application.*

Here, Yuen was unavailable to testify and the statements were against his penal interest. Thus, the only question is whether the trial court properly concluded Yuen's statements were not sufficiently trustworthy to warrant admission under Evidence Code section 1230. Concededly, Yuen's statements did not suggest he was " 'trying to fasten guilt' " on others. (*People v. Duarte, supra*, 24 Cal.4th at p. 616.) Instead, he took full responsibility for the shooting. Generally, sufficient indicia of trustworthiness may be found when an accomplice admits culpability and does not attempt to shift blame to another. (*People v. Brown, supra*, 31 Cal.4th at pp. 536-537.)

However, in applying this hearsay exception, a court may not find a statement sufficiently reliable " 'solely because it incorporates an admission of criminal culpability . . . .' " (*People v. Duarte, supra*, 24 Cal.4th at p. 611, quoting *People v. Campa* (1984) 36 Cal.3d 870, 883.) In this case, several factors persuade us Yuen's statements accepting responsibility for the shooting, in light of the circumstances under which they were uttered and his possible motivation, simply were not "sufficiently reliable to warrant admission despite [their] hearsay character." (*People v. Cudjo, supra*, 6 Cal.4th at p. 607; *People v. Frierson, supra*, 53 Cal.3d at p. 745).

Initially, we note the evidence established a criminal association between Chea and Yuen. This association was demonstrated by Chea's intercession in the "road rage" incident on Yuen's behalf. This association was buttressed by the fact that bullets identical to those in Chea's gun were found in the van driven by Yuen. Based on this relationship, the trial court reasonably could conclude Yuen was aware that Chea had a prior strike conviction and, if Chea were convicted in this case, he would serve a substantially greater prison term than Yuen would serve if convicted. Additionally, Yuen was intoxicated at the time he made the statements. Consequently, we find no error in the exclusion of Yuen's statements as untrustworthy. Indeed, defense counsel conceded at the close of the trial proceedings that the trial court properly had excluded the statement.



Further, the request to admit the evidence appears short sighted in that, had Yuen's statements been introduced, the People would have been permitted to demonstrate to the jury that the statements were not trustworthy. In this regard, the People could have introduced evidence that showed Yuen's motive to protect Chea, which would have exposed the jury to additional details of their association, Chea's criminal history and the substantial criminal exposure he faced if convicted.

In any event, although Yuen's statements were excluded from evidence at the jury trial, at the submission on the transcript, the prosecutor specifically asked the trial court to consider Yuen's statements in determining guilt or innocence. The trial court indicated it was aware of Yuen's statements and that it had assumed Yuen made the statements. Because the trial court considered Yuen's statements in connection with the submission on the transcript, Chea's claim of error fails with respect to the two counts of attempted murder.

Finally, even if error is found, it was harmless. All the evidence indicated Chea approached with a gun, fired it twice and returned to the Honda with it. Admission of Yuen's statements would not have altered the outcome of the trial. (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 611; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

## *2. Sufficiency of the evidence.*

Chea contends the evidence presented at trial was insufficient to support the convictions of attempted murder. Chea notes attempted murder requires the specific intent to kill and no reasonable trier of fact could have concluded Chea harbored an intent to kill or knew to a substantial certainty that death would occur. (*People v. Davenport* (1985) 41 Cal.3d 247, 262.) Chea argues the evidence shows nothing more than that Chea fired at the Mitsubishi in the mistaken belief its occupants had threatened his friend. Although this shows that Chea placed the occupants of the Mitsubishi in danger, it does not show express malice.

We disagree. Intent to kill may be inferred from the defendant's actions and other circumstances surrounding the crime. Here, Chea fired two bullets, one at the back windshield that was found on the rear passenger floor board of the Mitsubishi and another bullet that damaged the passenger side view mirror. Rodriguez and Torres remained inside the Mitsubishi at the time the shots were fired. This court on its own motion, ordered the paper exhibits transmitted from the Superior Court. The photographs of the Mitsubishi introduced into evidence at trial indicate that the bullet that damaged the side view mirror pierced the mirror, which was a short distance from where Rodriguez remained seated.

*People v. Arias* (1996) 13 Cal.4th 92, 162 explained that the purposeful use of lethal force permits an inference of an intent to kill "even if the act was done without advance consideration and only to eliminate a momentary obstacle or annoyance." (*Id.* at p. 162.) *People v. Smith* (2005) 37 Cal.4th 733, applied *Arias* to a factual situation in which the defendant fired a single bullet that shattered the rear windshield of a vehicle occupied by two individuals, the defendant's ex-girlfriend and her infant child. *Smith* held the act of firing a single bullet toward the individuals at close but not point-blank range, in a manner that could have resulted in their death, was sufficient to support an inference of intent to kill both victims. *Smith* noted the absence of a motive is not dispositive where a defendant uses a lethal weapon. (*People v. Smith*, 37 Cal.4th at p. 742.)

Applying these principles here, it is clear the evidence presented was sufficient to support the trial court's finding Chea harbored an intent to kill Rodriguez and Torres. It follows that Chea properly was convicted of two counts of attempted murder.

### **DISPOSITION**

The judgment is affirmed. The abstract of judgment is ordered corrected to reflect a five-year enhancement under Penal Code section 667, subdivision (a)(1), for a total term of 47 years and 8 months in state prison. The superior court is directed to prepare and forward to the Department of Corrections a corrected abstract of judgment.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.